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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

—v.—

MILTON FORMAN and ELLEN FORMAN, *et al.*,

Respondents,

—and—

UNITED HOUSING FOUNDATION, INC., *et al.*,

Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE BERGER
40 West 57th Street
New York, New York 10019
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

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Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari by the State of New York (State) and the New York State Housing Finance Agency (Agency) to review an interlocutory judgment of the United States Court of Appeals for the Second Circuit remanding this action to the United States District Court for trial (C1-2).* The unanimous decision of the Court of Appeals is reported at 500 F.2d 1246.

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* An earlier petition for a writ of certiorari in this case (Docket No. 74-157) has been pending since August 22, 1974. All "A," "B," and "C" references are to the pages of petitioners' appendices in the prior petition. All "D" and "E" references are to the pages of the appendices to the petition herein.

Questions Presented

1. Whether this case is ripe for review, where the Court of Appeals has merely upheld federal jurisdiction, has made no findings on the merits and has remanded the case to the District Court for further proceedings.

2. Whether this Court should grant certiorari to review a finding of waiver of Eleventh Amendment immunity in a case where the Eleventh Amendment is not even applicable to the Agency.

3. Whether this Court should grant certiorari to the State where there is the clearest unequivocal waiver of the Eleventh Amendment immunity both by statute and conduct.

Statement of the Case

This action arises out of the public solicitation of venture capital* by the sale of common stock for the construction of a mammoth cooperative housing development (A3). The respondents, purchasers of the common stock in issue, seek to represent 15,372 purchasers similarly situated, many of whom have invested their life savings in this enterprise (A3-4).

The project was constructed and financed under the New York State Mitchell-Lama Act, N.Y. Private Housing Finance Law §§ 1-59 (McKinney). Central to that statute

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* As the Court of Appeals observed, if the enterprise were to fail, respondents would have lost their entire investment (A18).

is the mechanism for substantial* financing** of housing by the New York State Housing Finance Agency.*** N.Y. Private Housing Finance Law §§ 40-59 (McKinney).

Pursuant to the Mitchell-Lama Act, the project had a sponsor, United Housing Foundation (UHF). The general contractor and sales agent for the project was Com-

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* *Vide infra* at 4-5.

** Petitioners repeatedly refer to the cooperative housing project as state "subsidized" (pages 3, 6, 14). In point of fact this is palpably misleading. The Mitchell-Lama Act was designed in part to provide for "State aid, *without cash subsidy provisions,* for the development of housing projects by housing companies formed under this Act." Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955) (emphasis added), *reprinted in part following* N.Y. Private Housing Finance Law § 10 (McKinney), at 8. Indeed, the very purpose of the statute was "to clarify the distinction between full-subsidized, low-income public housing programs administered by the State and its municipalities and *housing programs undertaken by private entrepreneurs with only limited public assistance, in the form of mortgage loans, aid in land assembly or site acquisition or tax abatement for a limited period.*" Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961, at 244, 245 (emphasis added). Pursuant to Article XVIII of the New York State Constitution, State subsidies are limited to projects which are "restricted to persons of low income as defined by law." N.Y. Const., Art. XVIII, § 6 (McKinney).

*** Temporary and long term financing of such developments is undertaken by the Agency through the sale of long term tax exempt bonds. The Agency is a corporation separate from the State and its bonds are not full faith and credit bonds of the State of New York. N.Y. Private Housing Finance Law § 46(8) (McKinney). Their tax exempt status results in a lower interest rate than corporate bonds would ordinarily yield, which in turn, produces an ultimate benefit to the stockholders and residents of the development. This type of financing is very common in New York; *viz.*, New York State Dormitory Authority, New York State Job Development Authority (N.Y. Public Authorities Law §§ 1682-86, 1805-09 (McKinney), and the entire statute generally). See also N.Y. Private Housing Finance Law §§ 44, 47 (McKinney Supp. 1974).

munity Services, Inc. (CSI), a corporation organized under the New York Business Corporation Law (McKinney) and a wholly-owned subsidiary of UHF (A4). The cooperative housing corporation, Riverbay Corporation (Riverbay), whose common stock was sold to the respondents, owns the land and buildings constituting the project (A4). The individual defendants herein, officers and directors of Riverbay, are also directors or officers, or both, of UHF and CSI (A5). Consequently, Riverbay was and is under the domination and control of UHF and CSI (A5).

Just as with every other large-scale public offering, the sale of Riverbay common stock was promoted by means of a prospectus, called in this instance an "Information Bulletin." Pursuant to a subscription agreement accompanying that Information Bulletin, every subscriber agreed to purchase 18 shares of Riverbay stock at $25 par value per share for each room in the subscriber's apartment, for an initial purchase price amounting to $450 per room (A5).*

Unlike the ordinary offering in which the State would have a purely governmental interest of regulation, under the Mitchell-Lama Act the State had a substantial proprietary interest in the public sale of stock. Under that statute, the State's participation in the financing of a project is limited to a specified percentage of the project cost, with the balance furnished by the purchasers of the stock. N.Y. Private Housing Finance Law §§ 22(2), 25 and 26(1)(b) (Mc-

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* The project had 72,896 rooms and the original purchase price paid by respondents was $32,795,550 (171a). The total purchase price was fixed at $3,856 per room (346a) but was raised to $5,737 per room (353a) as a result of the fraudulent conduct set forth in the amended complaint. The original total purchase price of this public offering, $283,695,550, was increased to $418,203,982 (compare 171a with 353a).

Kinney). In the instant case, as earlier noted, $32,795,550 in cash was provided by the respondents. That money had to be provided by respondents before the Agency could have furnished the financing for the balance of the project cost. *Id.* Were it not for the respondents' money, the State would not have the very housing it had determined was a public necessity. N.Y. Private Housing Finance Law § 11 (McKinney Supp. 1974). Without the public sale of these securities to the respondents, to quote the petition (page 5), the State would not have had its "new Rome."

Moreover, the State received $3,510,000 as a supervision fee and the Agency received $1,170,000 as a financing fee for this project from Riverbay and thus from the respondents (353a, 356a). Consequently, in addition to the Legislative decision to fulfill a State need for housing by using private and not public funds, the Mitchell-Lama Act actually placed the State in the business of supervising and financing such housing for a substantial fee.

Not only did the State have a proprietary interest in selling Riverbay's stock, it had absolute control over the development of this project from inception to completion. State regulation and supervision of housing enterprises built under the Mitchell-Lama Act is mandated by law. No cooperative corporation can be created under this statute without the approval of the Commissioner of the State Division of Housing.* N.Y. Private Housing Finance Law § 13 (McKinney).

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* The close interrelationship between the Commissioner and the Agency is underlined by the fact that the "chairman" of the Agency and its "chief executive officer" is the same "commissioner of housing" (N.Y. Private Housing Finance Law § 43(2)). This firm requirement was amended out of the statute after the relevant

The cooperative corporation cannot borrow or give security without the Commissioner's approval (*Id.* § 20(1)); its capital structure is dictated by law and subject to the Commissioner's approval (*Id.* § 21); the cooperative may not acquire real property, enter into any contract for construction or alteration of any real property, or sell any property, encumber or lease any real property, make any contracts for operation of the project, issue a guarantee of payment or enter into contracts for payment of salaries to officers or employees without the Commissioner's approval (*Id.* §§ 17, 27, 29). The Commissioner has the power to fix or to overrule the cooperative's rental structure (*Id.* § 31(1)); to investigate all aspects of the affairs of the cooperative and its dealings with others (*Id.* § 32); and, in the event that the cooperative violates any provision of its certificate, or of law, or of the mortgage, or of any order of the Commissioner, the Commissioner has the power to remove all of the cooperative's directors and to replace them with his own designees (*Id.* §§ 13, 15(c)) and to commence an action in the Supreme Court of New York for the purpose of having such violations stopped or prevented (*Id.* § 32(7), *as amended* (McKinney Supp. 1974)). Thus, from the initiation of a project and continuing thereafter State control is pervasive.

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dates herein by L.1969, chap. 528, § 3, but the Commissioner of Housing remained a member of the Agency and could be named chairman by the Governor (*Id.* § 42(2)). Significantly, the Agency's ability "to make mortgage loans and to undertake commitments to make mortgage loans" was and still is expressly made "[s]ubject to the approval of the commissioner of housing" (*Id.* § 44(9)). Apart from the Commissioner's absolute control of the Agency's ability to grant mortgage loans, he is by law "designated to act for and in behalf of the agency in servicing the mortgage loans . . . of the agency" (*Id.* § 55).

The Proceedings Below

Respondents filed their amended complaint in October, 1972. All petitioners moved, pursuant to Fed. R. Civ. P. 12 for a dismissal thereof for lack of federal jurisdiction (B4). The State and the Agency moved, in addition, on the grounds urged herein. The District Court dismissed the complaint on the ground that Riverbay stock was neither "stock" nor an "investment contract" within the meaning of Section 3(a)(10) of the Securities Exchange Act (B4), never reaching the issues raised herein. On appeal, the State and the Agency argued for affirmance as to them by reason of their special defenses, as well as joining in the arguments of the other defendants. On June 12, 1974, the Court of Appeals unanimously reversed (A20), upheld federal jurisdiction, overruled the State's and Agency's special defenses, and remanded the case to the District Court for further proceedings (A22, C2). On September 9, 1974, the Court of Appeals denied rehearing (D18) and rehearing en banc. On November 25, 1974, seventy-six days later, the within petition was filed.

Reasons for Denial of the Petition

1. *The Case Is Not Yet Ripe for Review.*

On the petitioners' motion, the United States District Court dismissed the amended complaint for "lack of subject matter jurisdiction" (B29). The United States Court of Appeals "[e]xpressing no opinion whatsoever on the merits," nevertheless "reversed" and "remanded . . . for further proceedings in accordance with [its] opinion. . . ." (A3, C2).

Consequently, the judgment sought to be reviewed is not final, but interlocutory and is therefore not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 130, at 232-33 (2d ed. R. Wolfson & P. Kurland 1951); R. Stern & E. Gressman, Supreme Court Practice § 4.19, at 180 (4th ed. 1969). See also *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Chicago & N.W. Ry.* v. *Osborne*, 146 U.S. 354, 355 (1892).

In an effort to overcome this defect, petitioners urge that in the event this Court does not grant certiorari at this time, the State would be put to the burden of defending its conduct by a "step-by-step" review of its regulatory processes before it could seek certiorari on an expanded record (page 5). Obviously, this argument could be and undoubtedly has been expounded by every petitioner who has sought certiorari of an interlocutory judgment and thus presents no valid reason for departing from the estab-

lished rule. Moreover, as above indicated, this action involves far more than the State's performance of its regulatory functions over the sale of securities by others. It involves a legally-mandated public sale of common stock to raise venture capital in order for the State to fulfill its housing program and further involves a statutory plan of regulation with respect to that housing where the State's supervisory role was all-pervasive.

2. *The Agency Cannot Assert the Defense of Eleventh Amendment Immunity.*

Regardless of this Court's determination whether or not to grant certiorari to the State to review the Eleventh Amendment issue, it is clear that no such defense is available to the Agency and it must remain a defendant in the pending action. The Agency is "a public benefit corporation" with the power "to sue and be sued." N.Y. Private Housing Finance Law § 44(1) (McKinney). It is a separate "legal public entity." [1972] Op. N.Y. Att'y Gen. No. 56-B. The State is, by statute, not liable for the Agency's notes or bonds, which are not debts of the State. N.Y. Private Housing Finance Law § 46(8) (McKinney). It has been repeatedly held, by federal and New York courts alike, that substantially similar governmental entities do not have immunity under the Eleventh Amendment. See *Matherson* v. *Long Island State Park Commission,* 442 F.2d 566 (2d Cir. 1971); *Prendergast* v. *Long Island State Park Commission,* 330 F. Supp. 438 (E.D.N.Y. 1970); *Zeidner* v. *Wulforst,* 197 F. Supp. 23 (E.D.N.Y. 1961); *New York Dormitory Authority* v. *Span Electric Corp.,* 18 N.Y.2d 114, 271 N.Y.S.2d 983 (1966); *Story House Corp.* v. *New York Job Development Authority,* 37 App. Div. 2d 345, 325 N.Y.S. 2d 659 (3d Dep't 1971), *aff'd mem.,* 31 N.Y.2d 942, 340 N.Y.S.

2d 929 (1972); *Braun* v. *State,* 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952); *Ciulla* v. *State,* 191 Misc. 528, 77 N.Y.S. 2d 545 (Ct. Cl. 1948).

3. *The Defense of Eleventh Amendment Immunity Has Been Waived by the State Both by Statute and by Conduct.*

As hereinabove indicated, the Eleventh Amendment defense is not available to the Agency at all. To the extent that the defense may be applicable to the State, it has been waived. Section 32(5) of the N.Y. Private Housing Finance Law itself unequivocally provides:

> "Supervision and regulation
>
> • • •
>
> With regard to duties and liabilities arising out of this article* the state, the commissioner or the supervising agency may be sued in the same manner as a private person."**

The word, "liability," is a term "of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." Black's Law Dictionary 1059 (rev. 4th ed. 1968). See also *Mayfield* v. *First National Bank,* 137 F.2d 1013, 1019 (6th Cir. 1943).

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* "This article" is, as the petition concedes (page 3), the entire Mitchell-Lama Act.

** Except for the virtually identical provision in Section 15 of the N.Y. Public Housing Law (McKinney), there is no other New York statute corresponding to section 32(5), nor, as far as we can ascertain from decisions involving statutory waiver of Eleventh Amendment immunity, is there a parallel provision in the laws of any other State. Consequently, the issue presented on this petition is not of sufficiently general application to merit this Court's attention.

As indicated above, the supervisory functions of the State through the Commissioner with respect to cooperative housing constructed and sold under "this article" are all-pervasive. The Commissioner is, *inter alia,* charged with responsibility to see that Riverbay complies "with law."* N.Y. Private Housing Finance Law § 32(1) (McKinney). Thus, if Riverbay's stock was sold in violation of the antifraud provisions of the federal securities laws, then the State failed to carry out its duty under "this article" and could "be sued in the same manner as a private person."

Ironically, the State, in its first "Question Presented" asks, in the very words of the title of Section 32, if by "supervision and regulation," the statutory waiver is applicable (page 3). Since the Legislature has seen fit to place the waiver under that title, it obviously has answered that question in the affirmative.

Waivers of immunity by a state couched in language far less comprehensive than that employed in the N.Y. Private Housing Finance Law § 32(5) quoted above have been construed as a consent to suit in the federal court. See, *e.g., Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959); *Vincent* v. *P.R. Matthews Co.,* 126 F. Supp. 102 (N.D.N.Y. 1954).**

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* "Law," as employed in other statutes, has been interpreted by the New York Courts to mean "laws of the land." *Kent* v. *Quicksilver Mining Co.,* 78 N.Y. 159, 182 (1879); *Raub* v. *Gerkin,* 127 App. Div. 42, 44, 111 N.Y.S. 319, 320 (2d Dep't 1908).

** The statute involved in *Knight* v. *New York,* 443 F.2d 415 (2d Cir. 1971) cited by petitioners (pages 12-13, 15) was N.Y. Real Property Actions and Proceedings Law § 1541 (McKinney), which provides only that "an action may be maintained . . . by or against the people of the State of New York," a statute totally different from Section 32(5).

Regardless of Section 32(5), it is clear that the State has waived its Eleventh Amendment immunity by its action. Pursuant to its Constitutional power to regulate interstate commerce, Congress enacted the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act). In enacting those statutes, Congress clearly intended to include States within the definition of "person" in Section 2(2) of the 1933 Act, 15 U.S.C. § 77b(2), and Section 3(a)(9) of the 1934 Act, 15 U.S.C. § 78c(a)(9). House Report No. 85, 73d Cong., 1st Sess. 11 (1933), stated:

> "Paragraph (2) [of the 1933 Act] defines 'person' in terms sufficiently broad to include within that conception not only an individual but also every form of commercial organization that may issue securities. *It includes within the concept of 'person' a government or a political subdivision thereof,* although later sections of the bill exempt from its provisions securities issued by the U.S., a State or a territory, or a political subdivision of any these governmental units." • (Emphasis added)

See also H.R. Rep. No. 85, *supra* at 14.

The legislative history of the 1934 Act also reveals that Congress considered a state to be a "person" within the meaning of Section 3(a)(9) of that statute as well. See Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 298, 720-21, 753 (1934); Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Cur-

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• The term "person" has been held to be broad enough to include even a foreign country. See *SEC* v. *Chinese Consol. Benevolent Ass'n,* 120 F.2d 738 (2d Cir.), *cert. denied,* 314 U.S. 618 (1941).

rency, 73d Cong., 1st Sess. 6903, 7038, 7446 (1934). In *Baron* v. *Shields,* 131 F. Supp. 370, 372 (S.D.N.Y. 1955), the District Court upheld the sufficiency of a complaint against a public instrumentality of the State of Nebraska under Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). The provisions exempting certain State securities from formal registration with the SEC (Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act)* did not, of course, exempt the State from the antifraud provisions in issue herein. *Tcherepnin* v. *Knight,* 389 U.S. 332, 344 (1967); *Hill York Corp.* v. *American International Franchises, Inc.,* 448 F.2d 680, 695 (5th Cir. 1971); *Baron* v. *Shields, supra.* Moreover, why would Congress have to enact an exemption for certain State securities, if a State were not a "person" subject to the provisions of the statutes?

Thus, when the State enacted the Mitchell-Lama Act in 1955, and when it codified the Act in 1961, it did so with the knowledge that the plan of cooperative housing created by the statute would put the State directly into transactions involving subscriptions for stock in cooperative corporations solicited through the use of the mails, which had already been the subject of antifraud legislation by Congress pursuant to its commerce power. The State's

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* Congress' concern for the marketability of State and municipal bonds led to the creation of a limited exemption for "securities which are direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof." 1934 Act § 3(a)(12), 15 U.S.C. § 78c(a)(12); cf. 1933 Act § 3(a)(2), 15 U.S.C. § 77c(a)(2). See Hearings on S. Res. 56, 84 and 97, *supra* at 7543-44; Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933); Hearings on S. 875 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1933). Obviously, Riverbay's stock was not such an exempted security.

voluntary entry into this sphere must therefore be construed as a waiver by conduct of its Eleventh Amendment immunity. *Parden* v. *Terminal Ry. of the Alabama Docks Department,* 377 U.S. 184 (1964).

Parden was cited with approval in this Court's more recent decisions of *Edelman* v. *Jordan,* 415 U.S. 651 (1974) and *Employees* v. *Missouri Public Health Department,* 411 U.S. 279 (1973), which latter decisions actually held that the immunity had not been waived. However, both of those cases are factually distinguishable for several reasons:

1. There is a clear, unequivocal statutory waiver by the State in Section 32(5).

2. Congress, as above indicated (pages 12-13, *supra*), has clearly set forth its intention to include "States" within the coverage of the federal securities laws.* Unlike the statute at issue in *Edelman,* where this court found that the Social Security Act did not create a private cause of action, or in *Employees,* where there was concurrent jurisdiction in the State courts, Congress, in enacting the 1934 Act, specifically and affirmatively placed exclusive jurisdiction for violations thereof in the federal courts, thereby indicating its determination to condition a State's future activities in the areas circumscribed by the 1934 Act upon a waiver of its Eleventh Amendment immunity. 1934 Act

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* Petitioners' argument that Congress, in enacting both the 1933 Act and the 1934 Act "carefully preserved the jurisdiction of the States to regulate securities" (page 9) is completely misplaced. Congress, in enacting these statutes, determined to subject securities, which had theretofore been subject to State control, to federal regulation as well. H.R. Rep. No. 85, 73d Cong., 1st Sess. 10, 27-28 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 2, 4 (1933); Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933).

§ 27, 15 U.S.C. § 78aa. The Mitchell-Lama Act was enacted twenty years *after* the passage by Congress of the 1933 Act and 1934 Act.*

3. The State in the instant case is not merely regulating the issuance of securities by others. The sale of cooperative stock to the public is a *sine qua non* of the statutory scheme for all cooperative housing provided pursuant to the Mitchell-Lama Act. N.Y. Private Housing Finance Law §§ 22(2), 25 and 26(1)(b) (McKinney). The initial venture capital *must* come from the stockholders. The State also derives millions of dollars in revenue from supervision and financing. In that context, the State has acted in a proprietary and not merely in a governmental role in this case. Moreover, under the Mitchell-Lama Act, the State's governmental role in this enterprise was far greater than what is normally understood by the term, "regulation". As above demonstrated, the State had virtually absolute control over the entire project from inception to completion.

MacKethan v. *Virginia,* 370 F. Supp. 1 (E.D. Va. 1974), and the unreported decisions, *Mathews* v. *Fisher,* No. C-1-74-284 (S.D. Ohio, April 16, 1974), *appeal docketed sub nom. Yeomans* v. *Kentucky Department of Banking and Securities,* No. 74-2003 (6th Cir., September 4, 1974), and *DeVoe* v. *Ostrander,* No. C-3-74-95 (S. D. Ohio, October 18, 1974), cited by petitioners (pages 11 and 15) as expressing a contrary view are both questionable authority and distinguishable on their facts. First, in all of these cases,

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* The State's reference to a State Housing Law enacted in 1926 (page 15) is also misplaced because that statute (L.1926, ch. 823) did not provide in any way for the sale of stock to the public, nor did it contain any provision similar to Section 32(5).

the district courts distinguished *Parden* without giving any consideration of the legislative history discussed above showing Congress' expressed intent to include States as "persons" within both the 1933 Act and 1934 Act. Further, they are distinguishable in that, in those cases, the State's role was purely that of regulating the actions of the issuer in the traditional governmental sense. As indicated on pages 4-5, *supra,* in the instant case, the State of New York had a proprietary interest in the public sale of Riverbay's stock, a $4,680,000 financial interest in a successful public sale and absolute control over Riverbay from inception to completion.

CONCLUSION

The petition for a writ of certiorari, to the extent presented by the Agency, is academic because the Eleventh Amendment immunity is inapplicable to the Agency. The petition, to the extent presented by the State, should be denied because it arises from an interlocutory order and the defense sought to be upheld has been waived by statute and by conduct.

Respectfully submitted,

GEORGE BERGER
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel